United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76 6117

REPLY BRIEF FOR APPELLANTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6117

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs-Appellees,

v.

PHILIP L. TOIA, et al.,

Defendants-Appellants.

and

F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education and Welfare,

Defendant.

APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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January 21, 1977

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REPLY BRIEF FOR APPELLANTS

I. THE ELEVENTH AMENDMENT BARS RETROACTIVE RELIEF

A. PLAINTIFFS' ARGUMENTS ON THE REPEALER LEGISLATION ARE WITHOUT MERIT

Plaintiffs' basic point is that the statute retroactively repealing the consent-to-suit legislation was designed to cover only one aspect of the latter legislation, i.e., the provision imposing a penalty upon states failing to comply with the consent-to-suit requirement.

The main flaws in plaintiffs' analysis are the following.

1. Plaintiffs cannot reconcile their argument with the language and plain meaning of the statute. The 1975 consent-to-suit legislation -- on the basis of which jurisdiction was originally rested by plaintiffs*/ and found by the District Judge -- undertook to do only two things. Section (a) imposed the affirmative requirement that states must consent to suits by providers and waive any immunity from such suits conferred by the Eleventh Amendment to the Constitution or otherwise; section (b) of the same Act required the Secretary to impose a penalty upon any state that failed to comply with section (a). Pub. L. No. 94-182, § 111(a) and (b).

Plaintiffs' argument comes down to a contention that the repealer retroactively voided section (b), the sanction provision, but did not void section (a) which imposed the consent to suit and Eleventh Amendment waiver provision in the first instance. The statute says and means just the opposite. The repealer statute expressly repealed both of these provisions effective January 1, 1976. Pub. L. No. 94-552. Had Congress intended to repeal only one of the two provisions or to repeal only one retroactively, it would have been an easy matter to have so provided; that

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*/ Compl. ¶ 21; 1st Amend. Compl. ¶ 26; 2d Amend. Compl. ¶ 27.

intent cannot be read into this legislation sub silentio, especially in a case of this kind where the statute is so straightforward and unambiguous.

2. The legislative history is diametrically opposed to plaintiffs' contention that the retroactive repealer statute was intended to eliminate only the penalty provisions set out in section (b) of the 1975 legislation. Unquestionably, one purpose of the repealer statute was to prevent penalties from being imposed upon states that had refused to comply with the consent-to-suit requirement. But the legislative history does not support -- flatly forecloses -- any argument that this was the sole, or even main, purpose of the repealer, or that states complying with the consent-to-suit requirement would be liable in federal court whereas sister states would not be. The Committee Reports*/ show that the congressional intent was just what the text of the repealer statute says: to undo altogether the effects of the ill-considered consent-to-suit legislation, both as to states that complied and those that failed to comply with it. The main points set forth in the legislative

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*/ Plaintiffs say that defendants "totally misrepresent the legislative history" of the repealer statute. In view of the serious nature of that charge and the brevity of the main Committee Report relied upon by both sides, we have attached the House Committee Report as an addendum to this brief. The Senate Report follows the House Report in all material respects. S. Rep. No. 94-1240, 94th Cong., 2d Sess. (Sept. 16, 1976).

history are that the purpose of the initial consent-to-suit provision was to open up the federal courts to suits which would require payment of funds to providers; that this provision was ill considered because it required the states to waive "one of their most basic rights" and it is of dubious constitutionality; that such suits would place an unreasonable burden upon the states; that the repeal would bar federal court jurisdiction for suits by providers seeking retroactive damages; and that, in addition, Congress desires to block the penalties prescribed by section (b) of the consent-to-suit legislation. There is not a word in the legislative history which says, or remotely suggests, that the repeal of that statute was designed to cover only the penalty provision and was not also designed to implement the other objectives of the repeal legislation set forth in the Committee Report.*/

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*/ As defendants pointed out in their main brief, the law is clear that the retroactive repeal ousts jurisdiction as to pending cases as well as future cases. In an effort to avoid the teaching of the leading case on point, De La Rama Steamship Co. v. United States, 344 U.S. 386 (1952), plaintiffs undertake a convoluted argument that the repealer statute could not have withdrawn "jurisdiction" from the federal courts because the consent-to-suit statute itself was not a jurisdictional grant. From that, plaintiffs conclude that the retroactive repeal of the consent-to-suit statute does not bear on the vitality of lawsuits extant at the time of the repeal. Both the premise and conclusion of plaintiffs' argument are erroneous. The Supreme Court has already ruled that the Eleventh Amendment immunity partakes of a jurisdictional bar and is subject to jurisdictional

(Cont'd)

3. Plaintiffs cannot reconcile their position with the construction of the statute adopted by HEW, the federal agency charged with implementation of the Medicare statute and which successfully urged on Congress the repeal of the consent-to-suit legislation. The Addendum to this brief contains HEW's "Action Memorandum" to the states directing states to withdraw, retroactive to January 1, 1976, consent-to-suit provisions included in State Plans to comply with the consent-to-suit legislation. Also appended is HEW's approval of New York's amendment to its State Plan in compliance with the repealer statute and the Action Memorandum. Plaintiffs' only substantive */ response on this point is a

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(Cont'd)

principles, including the principle respecting the timing of advancing Eleventh Amendment defenses. Edelman v. Jordan, 415 U.S. 615 (1974). Moreover, it does not matter whether Eleventh Amendment immunity is deemed "jurisdictional" or a first cousin thereof. There is no indication on the face of this statute or in its legislative history that Congress intended that any preexisting suits would be treated on some special basis; and plaintiffs have cited no authority for the proposition that retroactive jurisdictional bars preclude relief in existing suits but that resuscitation of Eleventh Amendment immunity does not.

*/ Plaintiffs urge the Court to disregard these centrally important actions on the ground that they, like the repeal legislation, postdated the District Court's jurisdictional decision and are therefore "not part of the record." Plaintiffs even refused to consent to inclusion in the Appendix documents setting forth these actions, although plaintiffs designated over 500 pages of documents for inclusion in the Appendix, virtually none of which is even vaguely alluded to in plaintiffs' brief to this Court.

(Cont'd)

conclusory and cavalier assertion that "the Secretary's alleged directive and approval were beyond his powers and unauthorized." But the repeal statute, by retroactively withdrawing the requirement to amend State Plans to provide a consent-to-suit provision, compelled HEW to take the action that it did; at the very least, the repeal statute authorized HEW to take all actions necessary to implement the repeal legislation which perforce must include revisions in State Plans.

4. Although adverting to the need to afford a reasonable and logical construction to the statute, plaintiffs cannot explain away the bizarre and unreasonable results which follow from their interpretation. By plaintiffs' theory, suits for retroactive relief could be

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(Cont'd)

The fact is that these agency actions bear centrally on this case since they reveal the construction of the statute by an important instrumentality of government which plays a central role in the Medicaid program. For that reason alone, the Court should have these facts before it in considering this important case. Furthermore, defendants moved the District Court to reopen the jurisdictional question following repeal so that these points, inter alia, could be pointed out to the lower court judge. Plaintiffs vigorously opposed further District Court consideration, and the lower court accepted plaintiffs' arguments. Surely plaintiffs cannot mean to suggest that this important question should be finally resolved before any court has had an opportunity to learn of the Department's construction of the repeal statute and of the present status of New York's Medicaid plan, which is the cornerstone of plaintiffs' lawsuit.

entertained only if two conditions were met: (1) the plaintiffs were located in a state which had complied with the consent-to-suit requirements of the 1975 legislation;*/ and (2) that such a suit would have to have been on file before the repealer legislation was passed (plaintiffs concede that Congress at least intended to preclude future suits for retroactive damages). What plaintiffs are really saying, as they finally concede in a footnote in their brief, is that only New York can be sued for retroactive payments. No attempt is made to set forth any rational policy that would be advanced by a statute penalizing obliging states and favoring recalcitrant states and which, in addition, empowers the entry of judgments for suits on file but precludes other suits. Suffice it to say that legislation having such discriminatory results would require the clearest indication of congressional intention.

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*/ In other states, no consent-to-suit provision would have been added to State Plans and, even in plaintiffs' view, there would be no basis for suing such states. Moreover, no penalties of any kind could be imposed upon those states because plaintiffs recognize that the repeal of the sanction provision was retroactive to January 1, 1976.

B. THE STATE DEFENDANTS NEVER "JUDICIALLY" WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY.

The Supreme Court has ruled that a state's waiver of its constitutional right to Eleventh Amendment immunity must be explicit and cannot be implied from ambiguous language or circumstances.*/

Plaintiffs ignore this directive by purporting to find a waiver of the state defendants' constitutional rights in two actions that not only fail to meet the above test, but when taken in context cannot reasonably support such a contention.**/ Neither of the alleged "judicial waivers" relied on

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*/ As the Court stated in Edelman v. Jordan:

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as ~~[will]~~ leave no room for any other reasonable construction.'" 415 U.S. at 673.

**/ The statement made by Assistant Attorney General Fine to Judge Lasker on July 28, 1976, cannot possibly be considered a waiver of immunity with regard to any period of time other than from the date of the injunction until HEW approval of the regulations in question. It is inconceivable that Judge Lasker would have asked the State to waive its immunity at the time he knew the State to be vigorously arguing in support of that immunity, or that the Assistant Attorney General would have instantly agreed to such proposition. Certainly the oral opinion of Judge Lasker handed down the following day (Appendix p. 408) does not reflect any such understanding.

(Cont'd)

by plaintiffs constitutes the "authoritative formulation and declaration of state policy" or "the kind of clear and purposeful waiver" of a federal constitutional right*/ required

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**/ (Cont'd)

Similarly, the State's agreement, after the District Court had rejected its jurisdictional argument, but pending appeal to this Court, to pay interest on any amount which might ultimately be deemed owing, cannot be construed as a waiver of its Eleventh Amendment immunity. It was clearly not so regarded at the time either by the District Court or the State defendants. The Court's order provided only that "such payments if hereafter required to paid, shall be paid . . . with interest" (emphasis added), which can hardly be said to require or even contemplate abandonment of the immunity claim then on appeal.

*/ Plaintiffs cite three New York lower court decisions for the proposition that "actions by [the Attorney General] during the course of a litigation can result in a waiver of immunity from suit." At best, these cases indicate that there is a split of authority in New York on the question of whether the Attorney General can waive the State's immunity under its own constitution in its own courts by making a general appearance in a case and failing to raise sovereign immunity in a timely fashion. Cf. In re Woitasek, 179 Misc. 947, 40 N.Y.S.2d 514 (Sup. Ct. N.Y.C. 1943); Seitz v. Messerschmitt, 117 App. Div. 401, 102 N.Y.S. 732, aff'd, 188 N.Y. 587, 81 N.E. 1175 (1907). The New York Court of Appeals has, however, held that as long as the court is properly put on notice of a sovereign immunity claim, the general appearance of the Attorney General will not waive immunity in a state court. Niagara Falls Power Co. v. White, 292 N.Y. 472, 55 N.E.2d 742 (1944).

Furthermore, as this Court has recognized, what may constitute consent to suit in state court is not necessarily waiver of an Eleventh Amendment right in federal court, since "only a 'clear indication' of the State's intention to submit to suit in Federal courts will surmount the Eleventh Amendment bar." (Emphasis added.) Knight v. State of New York, 443 F.2d 415, 419 (2d Cir. 1971); Great Northern Life Ins. Co. v. Read, 322

(Cont'd)

by the Supreme Court or by this Court in Rothstein v. Wyman, 467 F.2d 226, 239 (2d Cir. 1972), cert. denied, 411 U.S. 921, rehearing denied, 411 U.S. 988 (1973).

II. THE ROTHSTEIN DOCTRINE BARS THE RELIEF AFFORDED BELOW

Plaintiffs' main point in response to this Court's opinion in Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), is that the "very purpose" of the consent-to-suit legislation "was to make retroactive monetary relief available" and that this demonstrated the congressional "interest" in seeing to it "that retroactive monetary awards be available to address violations."*/

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*/ (Cont'd)

U.S. 47, 54 (1944); Kennecott Copper Corp. v. State Tax Comm., 327 U.S. 573, 577 (1946). While such a "clear indication" may be found in the State Constitution or authorizing legislation, Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), there is no such authorizing provision in New York law. Certainly, the mere "general appearance" of the Attorney General in federal court is not sufficient to constitute a waiver of Eleventh Amendment immunity which the Supreme Court has held may be raised at any stage in the proceedings. Edelman v. Jordan, supra at 677.

The only case cited by plaintiffs in support of its argument that the State Attorney General may waive Eleventh Amendment immunity in a federal court is Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974), which is clearly distinguishable from the instant situation in that no Eleventh Amendment claim was ever raised by the State until long after the defendant had voluntarily settled the claim. Moreover, the Court found that the award of attorneys' fees in that case "ha[d] at most the 'ancillary effect on the state treasury,'" allowed under Edelman v. Jordan.

*/ Plaintiffs also argue that Rothstein is inapplicable because it dealt with equitable rathar than legal relief. There are

(Cont'd)

Plaintiffs' argument falls for the reasons pointed out above, and additional ones as well. Rothstein holds that retroactive payments should not be ordered by the federal courts "absent explicit directions from Congress to the contrary" (at 235). Whatever can be said of plaintiffs' efforts to avoid the Eleventh Amendment bar arising out of the repealer statute, there is no way that plaintiffs can fairly read into the consent-to-suit legislation and its subsequent retroactive repeal an "explicit direction" to the federal courts to order retroactive payments. The most plaintiffs can say is that the repealer legislation did not abrogate existing Eleventh Amendment waivers but only blocked implementation of the sanction provisions and withdrew the Eleventh Amendment waiver requirement for the future. But no construction of the legislative history or of the language of the two statutes permits plaintiffs to go the next step and argue that there is extant an

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*/ (Cont'd)

several answers. First, the principle of Rothstein applies equally to legal and equitable claims. In fact, the case had to do with an order, in effect, to pay past period damages rather than some more classic form of equitable relief, and the Court's holding that the Federal courts should not impose that liability on state governments is applicable regardless of the form of relief sought or the theories relied upon by plaintiffs. Moreover, the lower court's decision was not based upon any breach of contract theory, as suggested by plaintiffs, but upon an alleged failure to comply with federal requirements -- just as in Rothstein. Finally, the notion that providers of services for welfare recipients somehow have greater access to the federal courts than do welfare recipients has no precedent in the case and would raise serious constitutional questions.

explicit direction from Congress that the federal courts should impose retroactive payment obligations on the states. In other words, whatever "explicit direction" from Congress was contained in the 1975 legislation necessarily has been countermanded by the 1976 repeal.*/

III. PLAINTIFFS' ARGUMENTS RESPECTING THE PROSPECTIVE INJUNCTIVE PORTIONS OF THE JUDGMENT ARE WITHOUT MERIT

Plaintiffs contend that the District Court order had prospective effect for a single day, Sunday, August 15, 1976, the day before HEW approval of the Plan provisions implemented by defendants was afforded.**/

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*/ It follows that even if plaintiffs' arguments on the Eleventh Amendment point were accepted, plaintiffs cannot escape the teaching of the Rothstein case. Even if the State had waived its Eleventh Amendment immunity, that waiver cannot confer equity jurisdiction upon this Court under the Rothstein analysis. Moreover, even if the repealer were deemed nonjurisdictional, as plaintiffs urge in their Eleventh Amendment argument, that would not avail plaintiffs. For the clear thrust of Rothstein is that the Court has no jurisdiction absent explicit directions from Congress to exercise that jurisdiction, and in this case the "directions" from Congress are for the Court to stay its hand.

**/ Plaintiffs also argue that one of the Plan amendments was not approved by HEW until October 4, 1976, and that this Court should affirm the judgment below for the period August 15 through October 3, 1976. In fact, this provision was not applied in the computation of payments to providers during that period, since HEW insisted that it specifically be made applicable only after its approval. Thus, plaintiffs' argument is entirely moot as to that provision.

The prospective aspect of the lower court decision is moot. Plaintiffs have miscalculated the applicable time period. The fact is that the court's order has no prospective effect whatsoever since HEW approval occurred before the court's order became effective. */

But even if the order had been effective for a single Sunday some months ago, the order should be treated as moot and vacated because an issue of this import should not be resolved by an appellate court on the thin basis that the order affects a single day, especially in view of the enormous burden of requiring the state to segregate services rendered for a single

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*/ The District Judge's August 2 judgment was stayed for a period of twelve days after its entry. The twelve-day stay period expired on Sunday, August 15, and, under Federal Rule 6, "in computing any period of time prescribed . . . by order of court, the last day of the period so computed shall be included, unless it is a . . . Sunday, . . . in which event the period runs until . . . Sunday . . . ." Therefore, the order did not become effective until after HEW approval.

day and thus compute payments for that done on a basis different from that utilized by the state for the balance of the year.

Respectfully submitted,

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January 21, 1977

ADDENDUM

1. HEW "Action Memorandum" of October 28, 1976:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

PLAN PREPRINT

ACTION TRANSMITTAL
SRS-AT-76-163 (MSA)
October 28, 1976

TO: STATE AGENCIES ADMINISTERING MEDICAL ASSISTANCE PROGRAMS

SUBJECT: Title XIX, Social Security Act: Preprinted State Plan Amendment to Implement Repeal of State Consent to Suit Requirement

STATUTORY REFERENCES: P.L. 94-552, October 18, 1976, repealing section 111 of P.L. 94-182

ATTACHMENT: Revised page 24a of preprinted plan, with Item 4.28, State Consent to Suit, deleted.

EFFECTIVE DATE: The repeal is effective retroactively to January 1, 1976

ACTION REQUIRED: Only States whose approved plans now include the consent to suit provision (page 24a as transmitted by SRS-AT-76-14 (MSA), January 28, 1976) need submit the attached revised page. States which submitted such a page which has not been incorporated in the plan should withdraw it.

INQUIRIES TO: SRS Regional Commissioners

W Mains
Commissioner
Medical Services Administration

2. HEW Approval of Deletion of State Consent To Suit:

[redacted]MENT OF HEALTH, EDUCATION, AND
AL AND REHABILITATION SERVICE
ington, D. C. 20201

Submit 6 Copies

TRANSMITTAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

REGIONAL COMMISSIONER SOCIAL AND REHABILITATION SERVICE DEPARTMENT OF HEALTH, EDUCATION, & WELFARE REGION II	TRANSMITTAL NUMBER: 76-57 STATE: New York PROGRAM IDENTIFICATION: XIX PROPOSED EFFECTIVE DATE: January 1, 1976

TYPE OF PLAN MATERIAL (CHECK ONE)

[redacted] STATE PLAN
AMENDMENT TO BE CONSIDERED AS NEW PLAN AMENDMENT

USE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

FEDERAL REGULATION CITATION

P.L. 94-552

NUMBER OF THE PLAN SECTION OR ATTACHMENT Page 24a	NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT Page 24a

SUBJECT OF AMENDMENT

State Consent to Suit - Section 4.28 - deleted.

GOVERNOR'S REVIEW (CHECK ONE)

GOVERNOR'S OFFICE REPORTED NO COMMENT ☐ OTHER, AS SPECIFIED:

COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL

SIGNATURE OF STATE AGENCY OFFICIAL [redacted]	FOR REGIONAL OFFICE USE ONLY DATE RECEIVED: DEC 8 1976 DATE APPROVED: DEC 8 1976 PLAN APPROVED - ONE COPY ATTACHED EFFECTIVE DATE OF APPROVED MATERIAL:
TYPED NAME: Philip L. Toia TITLE: Commissioner DATE: December 7, 1976	SIGNATURE OF REGIONAL OFFICIAL TYPED NAME: William Toby TITLE: Acting Regional Commissioner
RETURN TO: NYS Department of Social Services 1450 Western Avenue Albany, New York 12243	REMARKS

New York

4.27 Disclosure of Information on Providers of Health Care Services and Contractors.

The State agency has established procedures for disclosure of information on providers of services, contractors, carriers, intermediaries and State agencies. Those procedures meet all requirements of 45 CFR 250.70.

December 7, 1976

Dear Bill:

Enclosed is a revised page 24-a for insertion in the New York Title XIX State Plan.

This revised page is submitted pursuant to Action Transmittal SRS-AT-76-163(HSA) and Public Law 94-552, dated October 18, 1976, which repealed, effective January 1, 1976, legislation requiring "State Consent to Suit" Plan provisions. Such a provision was added to this State's Title XIX Plan, under protest by the State, on March 31, 1976. In view of the subsequent legislation and the Action Transmittal implementing that legislation, the "Consent to Suit" provision in the State Plan is of no effect since it was based entirely on federal legislation which has been repealed effective at the beginning of this year.

It does not appear from the Action Transmittal whether any formal HEW action on the submission, such as approval or confirmation of receipt of the Plan revisions, is contemplated. Notwithstanding that, the State would appreciate your prompt acknowledgement of receipt of the enclosed and confirmation of the State's understanding of the effect of this submission.

Sincerely,

Philip F. Toia

Mr. William Toby
Acting Regional Commissioner
Department of Health, Education,
and Welfare
Region II
26 Federal Plaza
New York, New York 10007

3. H.R. Rep. No. 94-1122, 94th Cong., 2d Sess., May 11, 1976:

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1122

REPEAL OF CONSENT TO SUITS RESPECTING HOSPITAL PROVIDER COST UNDER MEDICAID

MAY 11, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

including cost estimate of the
Congressional Budget Office

[To accompany H.R. 12961]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 12961) to amend the Social Security Act to repeal the requirement that a State's plan for medical assistance under title XIX of such act include a provision giving consent of the State to certain suits brought with respect to payment for inpatient hospital services, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

I. SUMMARY

The amendment repeals two provisions of current Medicaid law which:

(1) require that a State include in its State plan for medical assistance a provision granting the State's consent to suit in the Federal courts by or on behalf of providers of service on questions relating to the payment of reasonable cost for inpatient hospital services; and

(2) provide for a reduction of 10 percent of the amount of Federal Medicaid matching funds otherwise payable under title XIX of the Social Security Act to the State for expenditures in each quarter for which the State fails to include such provision in its State plan.

37-006

II. Background

The Subcommittee on Health and the Environment reported the bill to full Committee on Interstate and Foreign Commerce by unanimous voice vote on April 29. The full Committee considered the bill on May 5, and reported it by unanimous voice vote.

There has been no Senate consideration of similar legislation to date.

III. Cost of Legislation

The legislation has no estimable cost impact, although without it:

(a) States have alleged they would be subject to numerous suits in the Federal Courts, which would be costly in terms of the time and legal effort they require, and

(b) States who are so strongly opposed to consenting to suit that they refuse to amend their State medical assistance plans as required would suffer a reduction of 10 percent of the Federal matching funds provided under title XIX; thus to the extent the penalty was applied, Federal expenditures would be reduced.

The cost report prepared by the Congressional Budget Office follows:

Congressional Budget Office

cost estimate

1. Bill number: H.R. 12961.
2. Bill title and purpose: To repeal an existing provision under Title XIX of the Social Security Act which requires that a State waive immunity from litigation with respect to suits concerning payments for in-patient services.
3. Cost estimate: No budgetary impact.
4. Basis for estimate: Under existing law, a State could be fined by the Department of Health, Education, and Welfare for refusing to waive immunity. However, in the current services projections for Medicaid, it was assumed that States would have remained in compliance with the statute and thus not have lost those Federal payments. Thus, repealing this provision would not have any impact on current services projections.
5. Estimate comparison: Not Applicable.
6. Previous CBO estimate: Not Applicable.
7. Estimate prepared by: Jeffrey C. Merrill (225-4972)
8. Estimate approved by:

R. Scheppach,
(For James L. Blum, *Assistant Director for Budget Analysis*).

IV. History and Need for Legislation

The Medicaid program, established under title XIX of the Social Security Act, is a program of medical assistance for certain low-income individuals and families. Medicaid is financed jointly with State and Federal funds, with the Federal contribution to the cost of the program ranging from 50 to 83 percent. It is administered by each State, within broad Federal requirements and guidelines.

3

Title XIX of the Social Security Act requires that certain basic services must be offered in any State Medicaid program: inpatient hospital services, outpatient hospital services, laboratory and x-ray services, skilled nursing facility services for individuals 21 and older, home health care services, physicians services, family planning services, and early and periodic screening, diagnosis and treatment services for individuals under 21. In addition States may provide a number of other services if they elect to do so, including drugs, eyeglasses, private duty nursing, intermediate care facility services, inpatient psychiatric care for the aged and persons under 21, physical therapy, and dental care. States determine the scope of services offered (they may limit the days of hospital care or number of physicians' visits covered, for example). They also in general determine the reimbursement rate for services, except for hospital care where they are required to follow the Medicare reasonable cost payment system unless they have approval from the Secretary of Health, Education, and Welfare to use an alternate payment system for hospital care.

The Department of Health, Education, and Welfare is responsible for assuring that States follow the requirements of the Federal law in their Medicaid program. If a State fails to comply with Federal requirements, the Department is empowered to hold a conformity hearing on the matter, and on a finding of noncompliance, to cut off all Federal Medicaid funds. This mechanism has proved to be unwieldly and time-consuming and has, in fact, only been undertaken once by HEW.

Public Law 94–182, signed December 31, 1975, added a provision to title XIX, which was intended to help with this problem. It required that States amend their medical assistance plans to include therein consent by the State to be sued in the Federal courts by or on behalf of providers of service on questions relating to the payment of reasonable cost for inpatient hospital services. The new provision follows:

CONSENT BY STATES TO CERTAIN SUITS

SEC. 111. (a) Section 1902 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1861(u)) with respect to the application of subsection (a)(13)(D) to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise."

(b) Section 1903 of such Act is amended by adding at the end thereof the following new subsection:

"(f) Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined

with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1902(g)."

(c) The amendments made by this section shall (except as otherwise provided therein) become effective January 1, 1976.

The problem which the provision requiring States to consent to suit was designed to address related to actual or potential action by several States to freeze payment levels to hospitals or otherwise change their reimbursement system without receiving HEW approval for the variation from the Medicare method of paying for hospital care. Specifically, in Illinois, for example, the State had frozen the rate of interim payments to hospitals, without receiving approval from HEW for this change in procedure. The providers feared State-devised changes in hospital reimbursement would result in a loss of funds, or delay in receipt of payments. The providers feared that HEW would be slow to determine if State action was legal, and to bring a conformity hearing to cut off Federal funds if they did find the State out of compliance. Although the providers could sue the State to enjoin action States were immune from suits which would require payment of funds unless the State waived its immunity from such actions. The provision requiring States to consent to be sued in the Federal courts on issues relating to the payment of reasonable cost of hospital care effectively removed that immunity.

The provision itself, however, has become the cause of serious concern. First, in an effort to deal with a particular situation which had arisen in one or two States, a provision was adopted which now requires all States to waive one of their basic rights—immunity to suit. Further, it required them to waive their immunity to suit on all questions relating to the payment of the reasonable cost of inpatient hospital services; it is not limited to those situations where an alternate reimbursement system from that used by Medicare has been adopted. The Department of Health, Education, and Welfare, the Governors and Attorneys General of the States are all concerned that the result will be an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make efficient program administration virtually impossible. Appendix I contains communications from the National Association of Attorneys General and the National Governors' Conference expressing their grave concern.

Secondly, the provision added by Public Law 94–182, also provides that any State which fails to change its State medical assistance plan to consent to suits by providers concerning payment of reasonable cost is subject to a penalty of a reduction of 10 percent in the amount of the Federal share of their Medicaid funds. This sizeable penalty went into effect almost immediately upon enactment of the legislation; the bill became law on December 31, 1975, and States had to change their plans before March 31, 1976. This rapid change in plans has been impossible for many States to affect; some even require a meeting of the State legislature to change the State plan.

Further, several States have refused to make the change in State plan because of their strong concern about the inadvisability of waiving their immunity. Many States are thus now subject to the penalty, in amounts which could total over $40 million in the first quarter. This substantial penalty bears little relation to any substantive question

relative to these States' administration of the Medicaid program. (Appendix II indicates the status of the various States according to information supplied by HEW.)

Finally, serious questions have been raised concerning the constitutionality of the provision. At least 12 States have instituted suits challenging it.

V. Committee Findings

The Committee finds that the pressing problems resulting from the requirement that States consent to suit make repeal of the requirement necessary, and the potential imposition of the penalty involving millions of dollars make timely action imperative. The Committee recommends that H.R. 12961 be adopted.

The Committee notes, however, that the problem which gave rise to the original consent-to-suit provision is of concern. In addition there are others—recipients of the program as well as other providers—who may reasonably expect a more satisfactory way to assure that States administer their Medicaid programs in compliance with the requirements of Federal law. The Committee has requested the Department of Health, Education, and Welfare to provide the Congress with recommendations for alternate ways to respond to these concerns. HEW has responsibility to assure that States operate in compliance with the requirements of the Federal law. If the tools available to it currently are not sufficient to accomplish this, the Committee expects the Department of Health, Education, and Welfare to request the changes in law that are needed. Nonetheless, the Committee is convinced that the urgent nature of the problems occasioned by the provisions of sec. 111 of Public Law 94-182 require immediate action to remove it from the law.

VI. Inflation Impact Statement

The legislation has no inflationary impact because it has no budgetary impact (see Cost of Legislation).

VII. Oversight Findings

No formal oversight findings were part of the Committee consideration of the legislation. The Committee acted rapidly to remove the requirement because of the emergency nature of the problems raised by the original provision.

No findings on the subject have been received from the Committee on Government Operations or this Committee's Subcommittee on Oversight and Investigation.

VIII. Section-by-Section Analysis

Section 1 of the bill repeals the section of title XIX which requires States to include in the State plan for medical assistance a consent by the State to suit in the Federal courts by or on behalf of a provider of services concerning the payment of reasonable cost of inpatient hospital services, and repeals the section of title XIX which provides for a reduction of 10 percent in the Federal matching funds otherwise payable to a State for medical assistance for each quarter in which the State

has failed to include a consent to suit in the State medical assistance plan.

Section 2 of the bill makes the repeal effective retroactively to January 1, 1976.

IX. Agency Reports

The favorable report of the Department of Health, Education, and Welfare on H.R. 12961 is as follows:

Department of Health, Education, and Welfare,
May 10, 1976.

Hon. Harley O. Staggers,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for reports on H.R. 12915 and H.R. 12961, similar bills to amend title XIX of the Social Security Act to repeal the requirement that a State's medicaid plan include the State's consent to suit in Federal court by providers of inpatient hospital services.

In summary, although we believe that hospital providers should have some forum in which to arbitrate their differences with the States on reimbursement issues, we nevertheless are of the view that the consent to suit requirement is ill-considered and should be repealed.

In addition to amending section 1902(g) of the Social Security Act to require States participating in the medicaid program to waive their Eleventh Amendment immunity to suits brought against them by providers of inpatient hospital services, Public Law 94-182 also amended section 1903(e) of the Act to reduce by 10 percent, beginning with the first quarter of 1976, amounts otherwise payable by the Secretary under the medicaid program to a State that has not compiled with section 1902(g).

These provisions were the result of last-minute floor amendments to the bill. Had the responsible congressional committees been given the opportunity to consider and hold hearings on the amendments it would have become apparent that prompt compliance was impossible for a number of States.

In some cases, State constitutions must be amended and the legislatures are not in session. In other cases State legislatures were not in session for a sufficient period to pass the necessary implementing laws by March 31, 1976, the date set for compliance.

Moreover, inasmuch as the amendments seek to remedy a problem that relates only to medicaid expenditures for inpatient hospital services, their imposition of a penalty on a noncomplying State of 10 percent of its total medicaid funds seems harsh and unreasonable.

Under present law medicaid providers of inpatient hospital services are required to be compensated for what are known as their "reasonable costs." This rule has subjected the States and the Federal Government to substantial and rapidly escalating medicaid expenditures: expenditures that are out of proportion, in our judgment, to the value of the services provided. For this reason the President, in his February 9 Message to the Congress, recommended limiting increases in medicare payment rates in 1977 and 1978 (rates that control, also, medicaid reimbursement) to 7 percent a day for hospitals.

The inflation of health costs has created a near crisis condition in the budgets of some States. To meet this condition several States have imposed a freeze on their hospital reimbursement rates under medicaid. This freeze raises a substantial question with respect to the compliance of those States with title XIX of the Social Security Act and we have undertaken discussions with those States to resolve the matter.

From the standpoint of the hospital providers, however, the position of those States may create temporary cash flow problems for which the provider has no adequate remedy. We understand that State court relief is unavailable to a provider in those States whose courts deem the Federal Government (which is not amenable to suit in State court) to be a necessary party to any action. Relief to the provider in Federal court is also unavailable because of the Eleventh Amendment. Finally, there appear to be almost no States that have established administrative procedures in which providers may contest State reimbursement policy.

In supporting repeal of the amendment we therefore wish to underscore our serious concern with the problem that the amendment seeks to alleviate. Because of this situation the Department transmitted to the States on May 3, 1976, an instruction relating to State use of alternative methods of reimbursement for inpatient hospital services permitted by Department regulations (45 CFR 250.30(a)(2)(ii)). In substance, the Department proposes to approve alternative reimbursement methods only in the case of States that establish an appeals system under which hospitals may present data opposing the rates proposed.

In addition, providers can continue, of course, to institute suit for injunctive relief in State or Federal courts, as necessary. We would also point out that the enactment of the Administration's proposed Federal Assistance for Health Care Act, by removing the Federal involvement in establishing reimbursement rates, would doubtless remove also any basis for State courts to dismiss suits by providers against the State in State court on the ground that the Federal Government is a necessary party.

For all the foregoing reasons, we urge the enactment of either H.R. 12915 or H.R. 12961.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's objectives.

Sincerely,

(S) MARJORIE LYNCH.
Under Secretary.

X. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SOCIAL SECURITY ACT

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TITLE XIX—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

* * * * * * *

STATE PLANS FOR MEDICAL ASSISTANCE

SEC. 1902. (a) * * *

* * * * * * *

[(g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1861(u)) with respect to the application of subsection (a)(13)(D) to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise.]

PAYMENT TO STATES

SEC. 1903. (a) * * *

* * * * * * *

[(1) Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1902(g).]

* * * * * * *

APPENDIX I

STATE OF IDAHO,
OFFICE OF THE GOVERNOR,
Boise, April 28, 1976.

Hon. PAUL ROGERS,
Chairman, House Commerce Subcommittee on Health,
Rayburn House Office Building,
Washington, D.C.:

The nation's Governors recognize and appreciate your leadership in working to repeal Section 111 of P.L. 94-182. We are unanimous in support of H.R. 12961 and respectfully counsel prompt enactment by Congress.

(S) CECIL D. ANDRUS,
Chairman, Human Resources Committee,
National Governors' Conference.

* * * * * * * *

COVINGTON & BURLING

Re: Case No. 76-6117 in the
United States Court of Appeals
for the Second Circuit

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs-Appellees,

v.

PHILIP L. TOIA, et al.,

Defendants-Appellants,

and

F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing REPLY BRIEF OF DEFENDANTS-APPELLANTS in the Court of Appeals for the Second Circuit have been served by Registered Mail this 21st day of January, 1977, to each of the following:

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